Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TERRY STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS; GRANT WOODS, ATTORNEY GENERAL OF THE STATE OF ARIZONA

PETITIONERS.

-VS-

KENNETH JOHN FALCONE

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Ninth Circuit Court of Appeals held that the Double Jeopardy Clause barred Falcone's non-capital resentencing following a remand from the state appellate court. This holding is inconsistent with this Court's precedent indicating a reluctance to expand double jeopardy protections beyond the scope of capital sentencing proceedings. This holding also conflicts with the holdings of other circuit courts that have held that double jeopardy does not attach to non-capital resentencing proceedings.

In concluding that double jeopardy barred the state trial court from resentencing Falcone, the Ninth Circuit found that Falcone had a legitimate expectation of finality in his criminal sentence. That finding conflicts with the holdings of other circuit courts that a criminal defendant does not have a legitimate expectation of finality in any particular portion of a "sentencing package." These inconsistencies and splits of authority raise the following questions:

1. Does the Double Jeopardy Clause apply to non-capital resentencing proceedings?

2. If the Double Jeopardy Clause does apply to non-capital resentencing proceedings, does it prevent the trial court from reviewing a sentence following a remand from the state appellate court when that sentence was not appealed but was part of a sentencing package handed down by the trial judge pursuant to a plea agreement and the defendant appealed from the part of the sentencing package that was unfavorable to him?

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OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *Falcone v. Stewart*, 120 F.3d 1082 (9th Cir. 1997), and is published in Appendix A. The Order of the United States District Court for the District of Arizona is not reported, but is included in Appendix B.

STATEMENT OF JURISDICTION

Petitioners respectfully request that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit. The United States Court of Appeals for the Ninth Circuit issued its decision on August 14, 1997. (Appendix A). Petitioners filed a petition for rehearing with suggestion for rehearing *en banc*. (Appendix C). The Ninth Circuit Court of Appeals denied that motion on September 29, 1997. (Appendix D). Petitioners timely filed this petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and Supreme Court Rule 10.1.

PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in pertinent part:

> No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb. . . .

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

On November 24, 1989, Falcone entered into two plea agreements. In 89-8697 (hereinafter "97"), Falcone pled guilty to one count of attempted child molestation. The parties stipulated to a sentence of lifetime probation. In 89-02205 (hereinafter "05"), Falcone pled guilty to two counts of attempted child molestation. Sentencing in the "05" case was left to the discretion of the trial judge.

Falcone's lawyer requested that both cases be consolidated for disposition. The trial court entered an order consolidating the cases for a joint disposition. On February 23, 1990, the trial court sentenced Falcone in both cases. In "97"—the case in which the parties stipulated to lifetime probation—the trial court sentenced Falcone to 10 years imprisonment as a condition of probation. In "05," the trial court sentenced Petitioner to lifetime probation. Petitioner appealed both sentences and convictions to the Arizona Court of Appeals. Petitioner later dismissed the appeal in "05," the case in which he received no prison term.

While Falcone's direct appeal was pending in state court, he filed a petition for writ of habeas corpus, alleging that his due process rights were violated as a result of the 10-year prison sentence imposed as a condition of probation in "97" and by the state appellate court's delay in processing his direct appeal.

On November 18, 1991, the Arizona Court of Appeals issued its memorandum decision. The court found that the sentence imposed in "97" was improper because it deviated from the stipulated plea agreement. The court also found that it appeared "that the trial judge may have confused the cause numbers and the two plea agreements before him at the time of sentencing." (Appendix E-4.) The court of appeals remanded both cases because it was unable to discern the trial judge's specific intent. The court noted that, because the sentencing order contained both cause numbers, the matters were consolidated by the trial judge for purposes of sentencing, and "should continue to be considered together." (E-6, n.4 .)

Falcone and his lawyer filed separate motions for reconsideration and petitions for review of the Arizona Court of Appeals' decision. Neither petition for review raised a double jeopardy claim. The motions and petitions were denied.

The trial court resentenced Falcone in both cases on June 22, 1992. In the "05" case, the trial court resentenced Falcone to a term of 10 years imprisonment, followed by lifetime probation. In the "97" case, the trial court imposed lifetime probation as set forth in the plea agreement. Falcone appealed his resentencing in the "05" case, but he did not raise a double jeopardy claim.

The Arizona Court of Appeals affirmed Falcone's new sentence in the "05" case. Petitioner filed a petition for review in which he raised, for the first time, a double jeopardy claim. The Arizona Supreme Court denied review.

On September 23, 1993, the magistrate judge issued his report and recommendation in Falcone's habeas proceeding. The magistrate judge rejected Falcone's attempts to raise double jeopardy and lack of jurisdiction claims in supplemental pleadings because the double jeopardy claim had not been fairly presented to the Arizona Supreme Court and the jurisdictional claim was a question of state law. The magistrate judge found that Falcone's claim relating to his sentence in the "97" case was moot because the trial court resentenced Falcone and corrected its error.

On November 5, 1993, the Federal District Court adopted the magistrate judge's report and recommendation, and dismissed the habeas petition. Falcone appealed to the Ninth Circuit Court of Appeals. He claimed that his due process rights were violated when he was resentenced in "05" and that he had an expectation of finality in the original sentence imposed in that case.

On June 30, 1994, the Ninth Circuit Court of Appeals issued a memorandum decision, finding that Falcone's due process claims relating to his sentence in "97" and the delay in processing his state direct appeal were moot. (Appendix F). The court found that Petitioner had failed to exhaust his state court remedies with respect to the due process and double jeopardy claims in the "05" case. The court also found, however, that these claims were *not* procedurally barred because the Arizona Court of Appeals' fundamental error review necessarily included a review of Falcone's federal constitutional claims. (F-5-6). The court remanded these claims to the district court for a decision on the merits.

Petitioners petitioned for a rehearing *en banc* of the Ninth Circuit's conclusion that Falcone's federal claims had been exhausted as a result of

the state appellate court's statement that it reviewed for fundamental error. (Appendix G). The Ninth Circuit denied Petitioners' request. (Appendix H).

On remand, the Federal District Court rejected Falcone's claim that the trial court violated his due process rights by imposing a harsher sentence in the "05" case. The district court found that, because the trial court provided objective reasons for imposing a harsher sentence—to effectuate his original intent to sentence Falcone to a 10-year prison term-the corrected sentence was not motivated by vindictiveness. The district court set an evidentiary hearing to address Falcone's double jeopardy claim and to resolve the issue of consolidation.

An evidentiary hearing was conducted on December 1, 1995. The prosecutor testified that the parties intended a joint disposition of both cases:

> Q: And do you also recall agreeing with defense counsel, once it was contemplated that plea agreements would be reached in both cases, that there would be a joint disposition of these cases, as far as change of plea and at sentencing?
>
> A: My recollection is that the public defender who represented Mr. Falcone on one case, to some extent stepped aside. His lead counsel was a Mr. Hooper [in "05"], and we entered into what we called a *package deal, a joint disposition.* Now if that's what you're calling consolidated then my answer would be yes. But I think it was less than a clear intent that it was a consolidated case.
>
> Q: So for purposes of trial you did not intend to consolidate it. But for purposes of a change of plea and sentencing . . . it was . . . consolidated?
>
> A: That's correct.

The trial judge also testified that the two cases were consolidated for purposes of a change of plea and sentencing.

The district court found that imposition of a 10-year sentence in the "05" case did not violate Falcone's double jeopardy rights. (B-1). The

court concluded that, although the plea agreements were not interlocking, they were "part of a package, . . . and they were consolidated by minute entry of the [trial] court." (B-1). The district court agreed with the State's claim that the Arizona Court of Appeals had jurisdiction under state law to remand both cases for resentencing. The district court concluded that the Double Jeopardy Clause was not available to provide Falcone with an "unjustifiable windfall" as a result of a sentencing error. (B-2).

Falcone appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit issued the opinion that is the subject of this petition. *See Falcone v. Stewart*, 120 F.3d 1082 (9th Cir. 1997). The court held that Falcone's double jeopardy rights had been violated by the remand and resentencing in the "05" case. The court concluded that the two cases had not been consolidated and as a result, the sentence in the "05" case became final when Falcone dismissed the direct appeal in that case. (A-4).

Petitioners filed a petition for rehearing with suggestion for rehearing *en banc*. (Appendix C). Petitioners argued, *inter alia*, that the Double Jeopardy Clause was not implicated in the resentencing of a non-capital defendant following a successful appeal of a portion of the defendant's sentence. Petitioners also argued that the Ninth Circuit's holding announced a new rule in violation of *Teague v. Lane*, 489 U.S. 288 (1989). (C-4-6).

Because this case warrants review on the merits, Petitioners waive the *Teague* argument. See *Schiro v. Farley*, 510 U.S. 222 (1994) (State's waiver of *Teague* argument is an important consideration in deciding whether or not to grant certiorari).

SUMMARY OF ARGUMENTS

This case presents the Court with an opportunity to decide whether the Double Jeopardy Clause applies to non-capital resentencing proceedings; an issue this Court left unanswered in *Caspari v. Bohlen*, 510 U.S. 383, 397 (1994) and *Lockhart v. Nelson*, 488 U.S. 33, 37-38 n.6 (1988). This Court has never extended the double jeopardy principles announced in *Bullington v. Missouri*, 451 U.S. 430 (1981) and *Arizona v. Rumsey*, 467 U.S. 203 (1984) beyond the context of capital punishment. The circuit courts, however, are split on whether the Double Jeopardy Clause bars resentencing in a non-capital case. Without citing *Bullington* or *Rumsey*,

the Ninth Circuit Court of Appeals has extended the rationale in those cases even further by applying it to the vastly different circumstances presented in this case.

Moreover, the Ninth Circuit's opinion in this case is inconsistent with this Court's holdings in *United States v. DiFrancesco*, 449 U.S. 117 (1980) and *Pennsylvania v. Goldhammer*, 474 U.S. 28 (1985). It is also inconsistent with the conclusion reached by another panel of the Ninth Circuit in *United States v. Barron*, 127 F. 3d 890 (9th Cir. 1997), and the holdings of other circuit courts that a defendant has no legitimate expectation of finality in any particular portion of a sentencing package following a successful appeal. *See United States v. Pimienta-Redondo*, 874 F.2d 9, 16–17 (1st Cir. 1989); *United States v. Cochran*, 883 F.2d 1012, 1015 n.6 (11th Cir. 1989); *United States v. Shue*, 825 F.2d 1111, 1114–15 (7th Cir. 1987).

As discussed below, this case presents the broader question of whether the Ninth Circuit Court of Appeals erred by extending the Double Jeopardy Clause to a non-capital resentencing proceeding. The narrower question presented is whether the Ninth Circuit Court of Appeals erred by relying on *DiFrancesco* in reaching its conclusion that Falcone had a legitimate expectation of finality in an unchallenged sentence following a successful appeal of its counterpart.

REASONS WHY A WRIT SHOULD ISSUE

I

THE NINTH CIRCUIT'S OPINION IN THIS CASE IS CONTRARY TO THIS COURT'S PRIOR DECISIONS THAT THE DOUBLE JEOPARDY CLAUSE DOES NOT EXTEND TO NON-CAPITAL SENTENCING PROCEEDINGS.

Pursuant to Rule 10(c) of the Rules of the Supreme Court of the United States, this Court may consider granting certiorari when a federal appellate court decides an important question of federal law that has not been, but should be, settled by this Court or when the federal appellate court has decided an important federal question in a way that conflicts with this Court's prior decisions. Petitioners submit that the Ninth Circuit's opinion in this case presents an important federal question—whether the protections afforded by the Double Jeopardy Clause extend to non-capital

sentencing proceedings. This issue has not been, but should be decided, by this Court. The Ninth Circuit's opinion also conflicts with prior decisions of this Court.

In *North Carolina v. Pearce*, 395 U.S. 711 (1969), this Court recognized that the Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. 395 U.S. at 717. Where there is no threat of multiple punishment or successive prosecutions, however, the Double Jeopardy Clause is not implicated. *United States v. Wilson*, 420 U.S. 332, 344 (1975). It is well settled that double jeopardy principles do not bar imposition of a more severe sentence upon reconviction of a defendant who succeeded in getting his original conviction set aside. *Pearce*, 395 U.S. at 723.

This Court carved out an exception to this rule in *Bullington v. Missouri*, 451 U.S. 430 (1981), and *Arizona v. Rumsey*, 467 U.S. 203 (1984). *Bullington* and *Rumsey* are capital cases, and this Court's application of the Double Jeopardy Clause in those cases rested on the unique circumstances of a capital sentencing proceeding. To date, this Court has not extended the rationale in *Bullington* and *Rumsey*—that a capital defendant sentenced to life imprisonment cannot be sentenced to death following a reversal of the murder conviction and retrial—to non-capital resentencing proceedings.

In *Lockhart v. Nelson*, 488 U.S. 33 (1988), this Court was presented with the issue of whether the rule announced in *Bullington*, limiting the State's ability to subject a capital defendant to successive capital sentencing proceedings, was applicable to non-capital sentencing proceedings. 488 U.S. at 37 n.6. The Court left this issue unresolved because the State conceded in its briefs and at oral argument that *Bullington* carried over to non-capital sentencing proceedings.

Similarly, in *Caspari*, this Court had the opportunity to decide whether *Bullington* and *Rumsey* should be extended beyond the bounds of capital cases. This Court did not reach this issue, however, because the claim was *Teague* barred. In its analysis of the *Teague* issue, this Court concluded that "a reasonable jurist reviewing our precedents at the time respondent's conviction and sentence became final would not have

considered the application of the Double Jeopardy Clause to a noncapital proceeding to be dictated by our precedents." 510 U.S. at 393, 114 S. Ct. at 955 (citation omitted). Unlike *Caspari* and *Lockhart*, the instant case presents no procedural bar to considering the issues presented on the merits.

Other decisions of this Court demonstrate this Court's reluctance to extend *Bullington* beyond capital cases. In *United States v. DiFrancesco*, 449 U.S. 117 (1980), and later in *Pennsylvania v. Goldhammer*, 474 U.S. 28 (1985), this Court recognized that its prior double jeopardy decisions "clearly establish that a [non-capital] sentence does not have the qualities of constitutional finality that attend an acquittal," and "[a resentencing after an appeal intrudes even less upon the values protected by the Double Jeopardy Clause]." 449 U.S. at 134; 474 U.S. at 30 (bracketed phrases added by the *Goldhammer* Court). In *Poland v. Arizona*, 476 U.S. 147, 155-56, 106 S. Ct. 1749, 1755-56, 90 L. Ed. 2d 123 (1986), this Court rejected a capital defendant's argument that *Bullington* prohibited the sentencing judge from reimposing the death penalty after the Arizona Supreme Court vacated the sole aggravating circumstance relied on by the trial judge and found that another aggravating circumstance, erroneously rejected by the trial judge, was sufficient.

By establishing a bright-line rule—that double jeopardy is not implicated in non-capital sentencing proceedings—this Court will provide much needed guidance to state and federal courts facing a resentencing following a defendant's successful appeal or collateral attack of his conviction or sentence. Some courts have extended *Bullington* to non-capital sentencing proceedings by finding that the resentencing proceeding resembled a trial. *See Briggs v. Procunier*, 764 F.2d 368, 371-73 (5th Cir. 1985) (if jurors in first trial find that the state failed to prove necessary facts to establish prior convictions, double jeopardy prohibits the state from alleging same priors in second trial); *State v. Hennings*, 670 P.2d 256, 259, 261-62 (Wash. 1983) (*Bullington* controls the analysis of double jeopardy principles in bifurcated sentencing proceedings and if the state fails to establish habitual criminal status at first habitual offender proceeding, double jeopardy prohibits the state from attempting to establish sufficient facts at a second hearing); *Cooper v. State*, 631 S.W. 2d 508, 514 (Tex. Cr. App. 1982) (as a matter of federal constitutional law compelled by *Bullington*, if the state fails to prove facts necessary to establish enhancement allegation in first trial, it is precluded from trying

to prove that same allegation at second trial).[1] Other courts, however, have declined to extend *Bullington* to non-capital sentencing proceedings. *See Sailor v. Scully*, 836 F.2d 118, 125–26 (2d Cir. 1987) (even if double jeopardy has some application to enhancement proceeding, it did not bar second felony offender proceeding after State's earlier unsuccessful attempt to have defendant sentenced as a persistent felony offender); *Linam v. Griffin*, 685 F.2d 369, 374–76 (10th Cir. 1982) (habitual criminal proceedings are not an adjudication of guilt or innocence; thus, *Bullington* does not bar enhanced sentence following remand); *People v. Sailor*, 480 N.E.2d 701, 705–10 (N.Y. 1985) (enhanced sentencing proceeding does not implicate double jeopardy concerns because determination of guilt or innocence for priors has already been determined); *Durham v. State*, 464 N.E.2d 321, 324–25 (Ind. 1984) (*Bullington* does not apply to habitual offender determinations following retrial although jury in first trial determined that defendant was not habitual offender).

Application of the Double Jeopardy Clause should not depend on whether a particular jurisdiction's sentencing proceedings have characteristics resembling a trial. Rather, the determinative issue is whether the policy reasons for considering an acquittal on guilt or innocence as absolutely final apply equally to a non-capital resentencing decision that imposes less than the most severe sentence allowed by law, but more than originally imposed. Petitioners submits that by answering this question in the negative, this Court will put an end to the erroneous conclusion reached by some courts, including the Ninth Circuit, that

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1. Petitioners submit that the cases extending *Bullington* to non-capital enhancement proceedings are wrongly decided because they are premised on the conclusion that the State's failure to prove prior convictions (or habitual offender status) is the equivalent of an "acquittal" for double jeopardy purposes. As the court in *Linam* noted, an inquiry into whether the defendant is in fact the same person previously convicted of a felony is not the kind of adjudication that is subject to the protection of the Double Jeopardy Clause. 685 F.2d at 376. A criminal defendant has already been convicted of the prior convictions that the State seeks to use as enhancement. The fact that the State failed to convince a judge or jury that the defendant has been previously convicted of a felony says nothing about the defendant's guilt or innocence for that offense. Moreover, allegations of prior convictions do not create new or different offenses. Thus, it is not a "guilt" or "innocence" type of adjudication protected by double jeopardy principles. 685 F.2d at 375. Enhancement allegations are nothing more than tools used to enhance a defendant's punishment so that it fits the offender. *Pearce*, 395 U.S. at 723.

Bullington and *Rumsey* authorize application of double jeopardy principles in non-capital sentencing proceedings.

Application of the Double Jeopardy Clause to the instant case is even more attenuated than in a sentence enhancement case. Falcone's overall sentence was *not* increased or enhanced when he was resentenced. The trial court merely corrected itself and imposed the 10-year prison term in the "05" case rather than the "97" case. The net effect was the same. Regardless of whether the facts are similar to those in the instant case or those in a sentence enhancement case, non-capital resentencing proceedings are beyond the protections of the Double Jeopardy Clause.

The extension of *Bullington* and *Rumsey* beyond their intended scope should be corrected by this Court by announcing that *Bullington* and *Rumsey* are limited to capital sentencing proceedings. At the same time, this Court will be resolving the issue—whether double jeopardy concerns apply in non-capital sentencing proceedings—left unanswered in *Caspari* and *Nelson*.

II

THE NINTH CIRCUIT COURT OF APPEALS' OPINION IS INCONSISTENT WITH THE HOLDING OF ANOTHER NINTH CIRCUIT OPINION AND WITH OPINIONS FROM OTHER CIRCUITS THAT HAVE RELIED ON THIS COURT'S HOLDING IN *DIFRANCESCO* THAT A DEFENDANT DOES NOT HAVE A LEGITIMATE EXPECTATION OF FINALITY IN ANY DISCRETE PORTION OF A SENTENCING PACKAGE.

In order to reach its holding in *Falcone*, the Ninth Circuit ignored the state appellate court's finding that the "05" case and the "97" cases were consolidated for purposes of sentencing. The court should have presumed the correctness of this state law finding. *Sumner v. Mata*, 449 U.S. 539, 546–47 (1981) (the presumption of correctness applies to findings of state appellate courts as well as to findings of state trial courts). The evidence presented at the evidentiary hearing in federal district court established the parties' intent to consolidate the plea agreements for a joint disposition. Contrary to the Ninth Circuit's conclusion, the "05" and "97" cases were part of a "sentencing package," and the trial court considered the cases together when it handed down its sentence.

When a defendant's original sentence is increased in a resentencing proceeding, the double jeopardy inquiry turns on the extent and legitimacy of a defendant's "expectation of finality in the original sentence." *DiFrancesco*, 449 U.S. at 139. A defendant defeats any expectation of finality when he chooses to have his sentence reviewed. *United States v. Pimienta-Redondo*, 874 F.2d 9, 16 (1st Cir. 1989) (citing *United States v. Andersson*, 813 F.2d 1450, 1461 (9th Cir. 1987)). A defendant also has no legitimate expectation of finality when his sentences are part of a "package" and appellate review of one sentence necessitates review of the whole "package." *United States v. Barron*, 127 F.3d at 895 (9th Cir. 1997); *United States v. Binford*, 108 F.3d 723, 728–29 (7th Cir.), *cert. denied*, 117 S. Ct. 2530 (1997); *United States v. Shue*, 825 F.2d 1111, 1114–15 (7th Cir. 1987); *Pimienta-Redondo*, 874 F.2d at 16–17.

In *Barron*, a different panel of the Ninth Circuit Court of Appeals recognized the validity of the "sentencing package" doctrine, and specifically held that it applies to convictions and sentences obtained under a plea agreement:

> A set of convictions and sentences entered pursuant to a plea agreement may be viewed as part of a 'package' deal, considered and approved by the court. . . . [and] 'once it is determined that the plea agreement . . . resulted in a single composite sentence, any double jeopardy concerns disappear.'

127 F.3d at 895. In the present case, the trial judge testified that it was necessary to have both the "05 case " and the "97" case before him in order to impose the sentences he intended. In other words, he considered the plea agreements and sentences as a whole. The Ninth Circuit thus erred by rejecting the argument that the sentences in this case were part of a "package."

Other circuits have also recognized the sentencing "package" concept and have held that an unchallenged conviction or sentence may be reviewed and altered following a successful appeal or collateral attack of a portion of the "package." For example, in *Shue* the defendant appealed four federal convictions arising out of a multi-count indictment. The Seventh Circuit reversed three of the convictions, but affirmed the fourth. *Shue*, 825 F.2d at 1112. Following a remand for a retrial, the government asked the district court to resentence the defendant on the affirmed count. The

government's motion was granted, and the district court resentenced the defendant on the affirmed count. *Id.* The defendant appealed, claiming his double jeopardy and due process rights were violated when the district court resentenced him on a conviction that had been affirmed. The Seventh Circuit rejected these arguments. Relying on this Court's holding in *DiFrancesco*, the court held that the defendant did not have a "legitimate expectation of finality in any discrete portion of the sentencing package after a partially successful appeal." *Id.* at 1115. In *Shue*, the district court's intent in sentencing the defendant was rendered ineffective by the reversal of three of defendant's four convictions. Thus, the "package" became unbundled and resentencing the defendant on the only remaining conviction was the only way to effectuate the district court's original sentencing intent[2].

It makes no difference whether a sentence or conviction is affirmed on appeal, as in *Shue*, or is not appealed at all, as in the instant case. To draw that distinction would mean that a defendant could shield himself from resentencing on an unchallenged conviction or sentence by appealing only a portion of the package. As this Court noted 50 years ago in *Bozza v. United States*, 330 U.S. 160, 166–67 (1947), "[t]he Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." (quoted in *Jones v. Thomas*, 491 U.S. 376, 387 (1989)).

Assuming, as the Ninth Circuit should have done, that the "05" and "97" cases were consolidated under state law for purposes of sentencing, and that the respective sentences were part of an overall sentencing scheme, as the trial judge intended, they were a sentencing "package." That package became unbundled when Falcone successfully challenged his sentence in the "97" case. The trial court could not reconstruct Falcone's sentence to conform with the plea agreements without resentencing Falcone in both cases. Although Falcone may have had a subjective expectation of finality in the "05" case after he dismissed the appeal in that case, that expectation was hardly legitimate. Falcone knew that the trial court intended to impose a prison term and that he was not going to only be sentenced to lifetime probation. Accordingly, Falcone's resentencing did not implicate double jeopardy protections.

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2. The new enhanced sentence on the affirmed count was within the statutory limit for that offense. *Shue*, 825 F.2d at 1115 n.10.

CONCLUSION

Based on the foregoing authorities and arguments, Petitioners respectfully request this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDICES

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH JOHN FALCONE, Petitioner-Appellant, v. TERRY STEWART, DIRECTOR; Attorney General Of the State Of Arizona. Respondent-Appellees.	)	No. 96-15755 D.C. No. CV-91-01041-RGS OPINION

Appeal from the United States District Court
for the District of Arizona
Roger G. Strand, District Judge, Presiding

Submitted July 15, 1997*
San Francisco, California

Filed August 14, 1997

Before: Jerome Farris and A. Wallace Tashima,
Circuit Judges, and Tom Stagg, Senior District Judge.**

Per Curiam Opinion

*The panel unanimously finds this case to be suitable for decision without oral argument. FRAP 34(a); 9th Cir. R. 34-4.

**The Honorable Tom Stagg, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

FALCONE V. STEWART
SUMMARY

Criminal Law and Procedure/Double Jeopardy

The court of appeals reversed a judgment of the district court. The court held that under the Double Jeopardy Clause, a state court cannot resentence a defendant on a lawful final judgment of the conviction based on the mistaken imposition of a lighter sentence from an unrelated and unconsolidated case.

In unrelated cases, Appellant Kenneth Falcone was charged in Arizona State Court with criminal offenses. The trial court issued a minute order for a consolidated pretrial hearing. However, the parties entered into plea agreements. In the "97" case, the State stipulated to a penalty of lifetime probation with no prison term. The "-05" plea agreement had no stipulation regarding punishment.

The trial court imposed a sentence of probation only in the 05 case and ten years in prison plus probation on the -97 conviction. Falcone appealed separately in both cases, but dismissed the appeal in the -05 case before it was decided.

The Arizona Court of Appeals held that the sentence in the -97 case violated state law. However, the court determined that the trial court had consolidated the two cases for sentencing, and ordered resentencing in both cases. On remand, the trial court resentenced Falcone to probation on the -97 conviction, and to ten years in prison plus lifetime probation in the -05 case.

Falcone sought federal habeas corpus relief, contending that the Double Jeopardy Clause prohibited his resentencing on the -05 conviction.

The district court denied the petition on the ground that Falcone had not exhausted his state-court remedies. The court of appeals reversed, holding that he had.

On remand, the district court ruled that the resentencing was permissible because, as the state's attorney testified, Falcone's pleas were part of a package, i.e., the parties intended that he be sentenced to ten years in prison plus lifetime probation. Falcone appealed.

The State contended as a threshold matter that the court of appeals should reconsider its conclusion that Falcone exhausted his state-court remedies on his double jeopardy and due process claims. The State also asserted that the resentencing was lawful because the Arizona Court of Appeals correctly determined that the cases had been consolidated for sentencing purposes.

[1] The previous ruling of the court of appeals was the law of the case. The law of the case doctrine ordinarily precludes a court from reexamining an issue previously decided by the same court in the same case. This litigation proceeded for three years based on the conclusion of the court of appeals that the claims were exhausted. The court would not hold that they were not.

[2] The district court answered the wrong question. Even if the sentencing court had intended to sentence Falcone to a single, package sentence, that would not have established that there was no double jeopardy violation. [3] The Double Jeopardy Clause prevents increases in a defendant's sentence when the legitimate expectation of finality has attached to it. [4] Whether a legitimate expectation of finality has attached to a sentence turns on whether the court has power lawfully to resentence the defendant.

[5] In Arizona, the State cannot appeal a lawful sentence, and the sentencing court cannot modify it sua sponte. Arizona did not show that the initial sentence in -05 was unlawful. Because the sentence in that case was lawful, it became final for double jeopardy purposes when Falcone dismissed his appeal, unless it remained at issue in connection with his other appeal.

[6] The Arizona Court of Appeals held that as a matter of state law, it could remand the -05 case for resentencing because the case had been consolidated with the -97 case, which Falcone had appealed. But whether

the application of state law violates a defendant's double jeopardy rights is a question of federal law.

[7] Falcone could not be charged with knowledge of law that did not exist when he was first sentenced. No court has ever held that a defendant's double jeopardy rights are limited by changes in the law that occurred after his first sentencing. If a court could constitutionally order resentencing in violation of the law that a defendant reasonably expected would be applied, no sentence would ever be final. Whether Falcone had a legitimate expectation of finality in his sentence after he dismissed his appeal therefore depended on the state of Arizona law at that time.

[8] Under Arizona law, criminal cases may be consolidated on motion or on the court's initiative. Neither Arizona nor Falcone moved to consolidate, and the court never ordered consolidation. The cases were not consolidated. [9] The trial court's minute order scheduling a consolidated pretrial hearing did not purport to consolidate the *cases*, nor was it intended to have such an effect. The motion on which the minute order was based asked only the pretrial to be set on the same date. It was common practice to schedule proceedings involving the same defendant on the same day for the purpose of convience for the prosecutor, the State, the defendant, and the court. The order in no way affected the sentencing judge's ability to sentence Falcone on the separate cases.

[10] Each judgment entered by the sentencing court referred to the other case. There was no indication in the judgments, plea agreement, or sentences that the sentences were interlocking. [11] An Arizona criminal judgement, may specify that one sentence is to run consecutively with another provided that they are imposed at the same time, or the first sentence has already been imposed. No other connection is required, and none was apparent.

[12] The county attorney did not secure an agreement providing for a single sentence package in the two cases. No sentencing package was reflected in the in the plea agreements, and under Arizona law any term or agreement such as a package sentence would have been contained in those agreements.

[13] The State's conduct indicated that the State believed Falcone's sentence in -05 to be final, even though Falcone appealed the other sentence. In the briefs opposing Falcone's challenge to his -97 sentence, the State admitted that the sentence was illegal, and argued that the court could resentence Falcone to a prison term without rejecting the contrary plea agreement. Had the State believed the sentence in -05 to be part of the same sentence package, it could have been argued for resentencing on the -05 charge, on which there was no stipulation limiting prison time. But the State presented no such argument. The idea that the cases had been consolidated was first expressed in a footnote in the opinion of the Arizona Court of Appeals.

[14] Arizona never suggested that Falcone deceived the sentencing court. Falcone may have known of the court's error before he dismissed his appeal in -05, but knowledge of an error does not render an expectation of finality illegitimate.

[15] Application of the Double Jeopardy Clause to prevent Falcone from being resentenced might have allowed him to benefit from a simple error by the sentencing judge. The Double Jeopardy Clause protects a defendant's expectations, even when the result is that he receives a windfall. [16] The district court erred in concluding that resentencing Falcone in -05 did not violate his double jeopardy rights.

COUNSEL

Kenneth John Falcone, *pro se*, Tucson, Arizona, for the petitioner-appellant.

Dawn M. Northup, Assistant Attorney General, Phoenix, Arizona, for the respondents-appellees.

OPINION

PER CURIAM:

Kenneth John Falcone appeals the district's court's denial of his petition for habeas corpus under 28 U.S.C. § 2254. We have jurisdiction under 28 U.S.C. § 2253. We reverse.

I

On February 23, 1990, Falcone entered two guilty pleas in Arizona Superior Court, in case number CR-89-08697 ("the -97 case") and case number CR-89-02205 ("the -05 case"). The case arose from separate indictments that were factually unrelated.

The state stipulated the -97 plea agreement to a punishment of lifetime probation with no prison term. The court nevertheless sentenced Falcone to ten years in prison plus probation. The -05 plea agreement contained no stipulation regarding punishment, and the court imposed a sentence of probation only. It appears that the court confused the cases.

Falcone appealed the sentences in separate appeals, but dismissed his appeal in the -05 case before it was argued or decided. On the other appeal, the Arizona Court of appeals held that the sentence in the -97 case violated Arizona law. The court then held that the trial court had consolidated the two cases for sentencing purposes, and it ordered resentencing in both cases.

On remand, the trial court resentenced Falcone to probation on -97, and ten years in prison plus lifetime probation on -05. Falcone filed this § 2254 petition,[1] asserting various constitutional violations. The district court denied the petition on exhaustion grounds. Falcone appealed, and this court reversed. *Falcone v. Lewis*, 1994 WL 316022 at *3 (9th Cir.). The district court then denied the petition on the merits.

II

[1] As a threshold matter, Arizona asks us to reconsider our conclusion that Falcone exhausted his state court remedies on his double jeopardy and due process claims. We do not do so, because our previous ruling is now the law of the case. "The law of the case doctrine 'ordinary precludes a court from reexaming an issue previously decided by the same court . . .

1. Falcone filed this petition before the resentencing of which he now complains, and later amended it to include these double jeopardy and due process claims. As explained below, we have already held that the claims Falcone raises on this appeal are properly before us.

in the same case' " *United States v. Caterino*, 29 F.3d 1390, 1395 (9th Cir. 1994) (Quoting *United States v. Maybusher*, 735 F.2d 366, 370 (9th Cir. 1984)). This litigation has proceeded for three years based on our conclusions that the claims were exhausted, and we will not now hold that they were not.[2]

Accord *United States v. Foumai*, 910 F.2d 617, 621 (9th Cir. 1990) (Double Jeopardy challenges raise special concerns that deserve immediate appal to prevent the defendant from being subjected to further . . . violation of [his] constutional rights") (direct appeal).

III

We review the denial of a habeas corpus petition de novo, and the district court's factual findings for clear error. *Weston v. Kernan*, 50 F.3d 633, 636 (9th Cir.), *cert. denied*, 116 S.Ct. 351 (1995). Whether the double jeopardy clause has been violated is a question of law, reviewed de novo. *Id.*

The district court found that "the pleas were pat of a package, i.e., there was an intent for petitioner to receive a ten year sentence of incarceration and life time probation. The court concluded on this basis that

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2. The state argues that our previous ruling relied on the Arizona Court of Appeals review for "fundamental error" to conclude that the state courts had reviewed Falcone's claims. This reliance, the state contends is in conflict with our subsequent published opinion in *Martinez-villareal v. Lewis*, 80 F.3d 1301, 1306 (9th Cir.) *cert. denied*, 117 S.Ct. 588 (1996).

The state misconstrues our previous ruling. The particular constitutional claims at issue were readily apparent from the record, and Falcone had attempted to raise them in an amended brief. The Arizona court's fundamental error review almost necessarily included consideration of these particular claims.

Further, even if Arizona were correct, it is likely that Falcone could show that the failure to raise these obvious constitutional claims constituted ineffective assistance of counsel. Falcone has not had occasion to bring an ineffective assistance claim because of our previous ruling in his favor regarding exhaustion.

Falcone's double jeopardy rights were not violated when he was resentenced on -05.

[2] The district court answered the wrong question. Even if the sentencing court had intended to sentence Falcone to a single, package sentence, that would not establish that there was no double jeopardy

violation. *See United States v. Contreras-Subias*, 13 F.3d 1341, 1346 (9th Cir. 1994) (discussing cases where initial sentence frustrated intent of trial court; double jeopardy violation where "correction" merely reflected court's original intent).

A.

[3] The double jeopardy clause protects a criminal defendant's legitimate expectation that the proceedings against him are final. *United States v.*
DiFrancesco, 449 U.S. 117, 134-37 (1980). The clause therefore prevents increase in a defendant's sentence "where the legitimate expectation of finality has attached to the sentence." *Stone v. Godbehere*, 894 F.2d 1131, 1135 (9th Cir. 1990) (citing *DiFrancesco*); *see also United v. Moreno-Hernandez*, 48 F.3d 1112, 1116 (9th Cir. 1995) (double jeopardy clause applies to resentencing proceedings). We have also framed the question in terms of a defendant's "reasonable" expectation of finality, apparently without distinction. *Foumai*, 910 F.2d at 621. Because the Supreme Court used only the legitimate expectation" language, we employ that phrasing. *See DiFrancesco*, 449 U.S. at 137.

[4] Whether a legitimate expectation of finality has attached to a sentence turns on whether the court had the power lawfully to resentence the defendant. *See, e.g. Moreno-Hernandez*, 48 F.3d at 1116-17 (finality of sentence after defendant's appeal depends on whether district court resentenced in accordance of with mandate from appellate court); *United States v. Ponce*, 51 F.3d 820, 826 (9th Cir. 1995) (per curiam) (double jeopardy analysis "turns on 'whether the district court's authority was abridged'") (quoting *United States v. Caterino*, 29 F.3d 1390, 1394 (9th Cir. 1994)); *Stone v. Godbehere*, 894 F.2d at 1135 (state court resentencing violated double jeopardy because court had no jurisdiction to resentence).

B.

[5] In Arizona, the state cannot appeal a lawful sentence, and the sentencing court cannot modify it sua sponte. *Stone v. Godbehere*, 894 F.2d at 1135 (in Arizona, a lawful sentence cannot be modified and is final for double jeopardy purposes upon pronouncement in open court). Arizona has not shown that the initial sentence in -05 was unlawful.[3] Because the sentence in that case was lawful, it became final for double jeopardy purposes when Falcone dismissed his appeal of it unless it remained at issue in connection with his other appeal. *See id* (unappeable sentence is final for double jeopardy purposes); *DiFrancesca*, 449 U.S. at 136 (1980) (defendant can have no expectation of finality until [an] appeal is concluded"); *Foumai*, 910 F.2d at 621 (same; also can be no expectation of finality until time for government to appeal has run).

[6] The Arizona Court of Appeals held, as a matter of state law, that it could remand the -05 case for resentencing because the case had been consolidated with the -97 case, which Falcone had appealed. We did not review state law questions in habeas corpus proceedings, but whether the application of state law violated a defendant's double jeopardy rights is a question of federal law. *Boyd v. Meachum*, 77 F.3d 60, 65 (2nd Cir. 1996) (citing *Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir. 1991) (due process rights)). Even where a state court determination appears to decide a defendant's double jeopardy claim, we conduct our own analysis to determine whether the double jeopardy clause was violated. *Dixon v. Dupnik*, 688 F.2d 682, 684 (9th Cir. 1982) (citing *Brown v. Ohio*, 432 U.S. 161, 168 (1977)).

[7] Falcone is charged with knowledge of the law, *DiFrancesco*, 449 U.S. at 136, but he cannot be charged with knowledge of law that did not exist when he was first sentenced. No court has ever held that a defendant's double jeopardy rights are limited by changes in the law that occur *after* his first sentencing, and we decline to do so. If a court could constitutionality order resentencing in violation of the law that a defendant reasonably expected would be applied, then no sentence would ever be final. Whether Falcone had a legitimate expectation of finality in his sentence after he dismissed his appeal therefore depends on the state of

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3. The state argues that the sentence was unlawful because it did not reflect the intent of the sentencing court. This argument is meritless.

Arizona law at that time. We must determine, notwithstanding the Arizona court's post hoc conclusion that the cases were consolidated, whether they had been joined under Arizona law as it then existed.

[8] Under Arizona law, criminal cases may be consolidated on motion or on the court's initiative. Ariz. R. Cr. P. 13.3. Neither Arizona nor Falcone moved to consolidate, and the court never ordered consolidation.[4] The cases were not consolidated under Arizona law.

The state now advances three pieces of evidence in support of the Arizona Court of Appeal's conclusion that the cases were consolidated "for sentencing purposes." If the state's contention were correct, Falcone's appeal of his sentence in -97 might have prevented a legitimate expectation of finality from attaching to the other sentence. But none of the state's evidence tends to show that the cases were ever treated as a unit.

[9] First, the trial court entered a minute order continuing the trial in -05 and scheduling a consolidated hearing for the two cases. However, the order did not purport to consolidate the *cases*, nor was it intended to have such an effect. The motion on which the minute order was based asked only that "the Pretrial in both of these case[s] should be set on the same date." County Attorney John Dittsworth, who represented the state in the criminal proceedings, testified that it was common practice to schedule proceedings involving the same defendant on the same day. He also testified that such consolidated hearings were "for purposes of convenience . . .for the prosecutor, the State, the defendant, and the Court." The Superior Court judge who sentenced Falcone testified that consolidated hearings were common for purposes of efficiency and that the October 16 order "in no way affected [his] ability to sentence Mr. Falcone on the separate cause numbers." The minute order did not consolidate or otherwise join the cases.

[10] Second, each judgment entered by the sentencing court referred to the other case. Specifically, each judgment provided that the sentence was to run consecutively with the other. The Arizona Court of Appeals

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4. The two cases could have been consolidated under Arizona Rule of Criminal Procedure 13.3(a)(1), which applies to charges that "[a]re of the same or similar character." However, if the court had ordered consolidation, Falcone would have had an absolute right to severance. Ariz. R. Cr. P. 13.4(b); *State v. Bravo*, 829 P.2d 322, 328 (Ariz. App 1992) (citing *State v. Sustaitia*, 583 P.2d 239, 244 (Ariz. 1978)).

concluded from this that the cases had been consolidated. However, there was no indication in the judgments that the sentences composed a single consolidated package. As County Attorney Dittsworth testified regarding the plea agreements and the sentences: "They are not interlocking. There is nothing in the [agreement on -05] which says [the court] will then do the following in [-97]." The Superior Court judge also testified that the two sentences were not interlocking.

[11] A criminal judgement in Arizona may specific that one sentence is to run consecutively with another provided that (1) the sentences are imposed at the same time, or (2) the first sentence has already been imposed. *State v. king*, 802 P.2d 1041, 1043 (Ariz. App. 1990); Ariz. Stat. § 13-708. No other connection between the cases is required, *see id.*, and none was apparent here. The judgments therefore do not establish that the sentences were part of a package or that the cases were otherwise combined.

[12] Third, County Attorney Dittsworth testified that he had intended to secure an agreement providing for a single sentence package in the two cases. But he did *not* secure such an agreement. He admitted that no sentence package is reflected in the plea agreements Falcone signed, and that under Arizona law any term or agreement such as a package sentence would have been contained in those agreements: "[T]he terms and conditions of the potential sentence[s] are contained in the written plea agreements, period." Dittsworth's testimony does not tend to show that the cases were combined in any way.

[13] Our conclusion that the two cases remained separate under Arizona law is buttressed by the state's conduct after the initial sentencing. That conduct indicates that the state believed Falcone's sentence in -05 to be final, even though Falcone had appealed the other sentence. In it's brief opposing Falcone's challenge to his -97 sentence, the state admitted that the sentence was illegal. The state argued only that the court could resentence Falcone to a prison term without rejecting the contrary plea agreement. Had the state believed the sentence in -05 to be part of the same sentence package, it could have argued for resentencing on the -05 charge, on which there was no stipulation limiting prison time. But the state presented no

such argument. The idea that the two cases had been consolidated was first expressed in a footnote in the Arizona Court of Appeal's opinion.[5]

C.

[14] There are other limitations on when a defendant can legitimately expect that his sentence is final. There can be no legitimate expectation of finality in an erroneous sentence if the error results from the defendant's intentionally deceiving the court. *United States v. Jones*, 722 F.2d 632, 638-39 (11th Cir. 1983); *United States v. Bishop*, 774 F.2d 771, 776 (7th Cir. 1985) (citing *Jones*). But Arizona has never suggested that Falcone deceived the sentencing court. Falcone may have known of the Court's error before he dismissed his appeal in -05, but knowledge of an error does not render an expectation of finality illegitimate. *See Jones*, 722 F.2d at 638 (holding that a defendant who is "blameless [but knows of the error], may *legitimately* expect that the sentence. . .will not later be enhanced") (emphasis in original).

[15] Application of the double jeopardy clause to prevent Falcone from being resentenced may allow him to benefit from a simple error by the sentencing judge. The district court considered this result untenable, citing *Jones v. Thomas* for the proposition that prisoners may not invoke the double jeopardy clause to "provide unjustified windfalls." 491 U.S. 376, 387 (1988). But the windfall in *Jones* was "unjustified" because the defendant "plainly had *no expectation*" of finality" — he had sought relief from the sentence, giving the court the power to resentence him. *Id.* at 386 (emphasis added). Here, the court had no such power. The double jeopardy clause protects a defendant's expectations, even where the result is that he receives a windfall. "Where the [Double Jeopardy] Clause does apply, 'its sweep is absolute.'" *DiFrancesco*, 449 U.S. at 131 (quoting *Burks v. United States*, 437 U.S. 1, 11 n.6 (1978)).

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5. The state also did not suggest, when Falcone moved for dismissal of his appeal in the -05 case, that its position was that the -05 sentence was at issue in the pending appeal of -97.

[16] Falcone's sentence could not have been increased under Arizona law as it existed at the time of his first sentence. From this conclusion it follows that Falcone's expectation of finality was legally legitimate: a defendant can legitimately expect that the courts will follow the law. Thus, the district court erred in concluding that resentencing Falcone in the -05 case did not violate his double jeopardy rights.

IV

CONCLUSION

The denial of Falcone's petition is **Reversed** and the case **Remanded** to the district court with directions to grant the writ of habeas corpus.[6]

6. This disposition of the double jeopardy claim makes it unnecessary for us to consider Falcone's due process claim.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

KENNETH JOHN FALCONE,	)	
	)	CIV 91-1041-PHX-RGS
Petitioner,	)	
	)	
-vs-	)	ORDER
	)	
SAMUEL A. LEWIS, et. al.	)	
	)	
Respondent's.	)	
	)	
	)	

The Court earlier considered and rejected the Report and Recommendation prepared by the magistrate judge finding that petitioner was entitled to an evidentiary hearing which was held on December 1, 1995. The court now makes it findings based on the entire record presented, the papers filed in this matter including testimony and documents submitted at the evidentiary hearing.

The court will not reiterate those facts previously set forth in its Order filed September 6, 1995 [doc. #75].

The Court finds and concludes that petitioner's claim that the imposition of a 10-year sentence in Petitioner's case CR 89-2205 did not violate petitioner's double jeopardy rights.

Evidence presented at the hearing demonstrated that although the pleas entered in CR 89-2205 and in CR 89-8697 were not interlocking, the pleas were part of a package, i.e., that there was an intent for petitioner to receive a ten-year sentence of incarceration and life time probation, and that they were consolidated by minute entry of the court.

As the Arizona Court of Appeals noted, the sentence in CR 89-8697 was unlawful because it imposed both a term of imprisonment and lifetime

probation on the same offense. Consequently and notwithstanding that petitioner dismissed the appeal in CR 89-2205, the Arizona Court of Appeals considered and vacated both sentences and remanded both causes for resentencing in accordance with the intent of the parties for a sentence of incarceration.

The Court concurs with respondents that petitioner's cases were properly consolidated so as to confer jurisdiction on the Arizona Court of Appeals and to permit the court of appeals to vacate the sentences under both case numbers. The double jeopardy clause should not be invoked under these circumstances to provide petitioner with an unjustifiable windfall as a result of a sentencing error. *Jones v. Thomas*, 109 S.Ct. 2522, 2528-29 (1989).

Accordingly,

IT IS ORDERED denying petitioner's petition for writ of habeas corpus.

IT IS FURTHER ORDERED denying as moot petitioner's motion for order of release pending decision of the court. [doc #65].

. . .

. . .

FURTHER ORDERED directing the clerk of the court to enter judgment in accordance with this Order.

DATED this 28th day of March, 1996.

/S/_____
HONORABLE ROGER G. STRAND
U.S. DISTRICT COURT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 96-15755

KENNETH JOHN FALCONE,	)	ON APPEAL FROM THE
	)	UNITED STATES
Petitioner-Appellant,	)	DISTRICT COURT FOR THE
	)	DISTRICT OF ARIZONA,
	)	
	)	No. CIV-91-01041-PHX-RGS
-vs-	)	
	)	
	)	
SAMUEL A. LEWIS, et al.,	)	
	)	
Respondents-Appellees.	)	

RESPONDENTS-APPELLEES' PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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Rule 35, Federal Rules of Appellate Procedure 1

Rule 40, Federal Rules of Appellate Procedure 1

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, Respondents-Appellees ask this Court to reconsider its decision filed August 14, 1997, and suggest that a rehearing en banc would be appropriate. Reasons in support of this request are set forth in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction And Procedural History.

A rehearing in this case is appropriate because the decision announces a new rule in contravention of *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989); because it erroneously expands the Double Jeopardy Clause to non-capital sentencing proceedings; and because it decides an issue that is purely a matter of state law.

Petitioner entered into two plea agreements in state court. The trial court sentenced Petitoner in both cases on the same day. In the "97" case, the parties stipulated to lifetime probation. In the "05" case, there was no agreement relating to sentencing. It is undisputed that the trial court mistakenly reversed the sentences. In the "97" case, the trial court sentenced Petitioner to a term of 10 years imprisonment. In the "05" case, the trial court imposed lifetime probation. Petitioner appealed both sentences to the Arizona Court of Appeals, but he dismissed the "05" appeal. The state appellate court found that the sentence in the "97" case was unlawful because it did not comport with the agreement of the parties. In its memorandum decision, the state appellate court expressly stated that because the sentencing order contained both case numbers, the matters were consolidated for purposes of sentencing, and should remain that way for resentencing. The trial court resentenced Petitioner in accordance with the original intent and agreement of the parties.

Although Petitioner failed to present a double jeopardy claim to the Arizona Court of Appeals, this Court held that the claim was not precluded on collateral review because the Arizona Court of Appeals conducted a review for fundamental error, which necessarily included a review for federal constitutional error. This Court rejected Respondents' argument that this Court's holding in *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1306 (9th Cir. 1996)—that a state appellate court's fundamental error review does not constitute a fair presentation of federal constitutional error —barred federal review in this case.

Following an evidentiary hearing in federal district court on the merits of Petitioner's double jeopardy claim, the district court found, after hearing testimony from the trial judge that he intended that the two cases be consolidated for sentencing, that the Arizona Court of Appeals properly consolidated the two cases for re-sentencing, and that double jeopardy did not bar a resentencing in the "05" case to reflect the terms of the original plea bargains and the intent of the parties.

In its August 14, 1997 opinion, this Court reversed the district court's ruling, and held that the Double Jeopardy Clause precluded a resentencing in the "05" case because, contrary to the state courts' findings, that case was not consolidated with the "97" case and that sentence became final when Petitioner dismissed his appeal.

II. Arguments.

A. New Rule.

In *Teague*, the Supreme Court stated that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." 489 U.S. at 301. The Court further stated:

> To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.

(Id., emphasis in original).

Precedent existing at the time Petitioner's conviction became final dictated that a non-capital sentence is not accorded the same constitutional finality associated with an acquittal. *United States v. DiFrancesco*, 449 U.S. 117, 132-34, 101 S. Ct. 426, 435-36, 66 L. Ed. 2d 328 (1980). Thus, this Court's holding in the instant case—that double jeopardy attached to Petitioner's non-capital sentence when he dismissed his state court appeal—announces a new rule on collateral rule, contrary to the dictates of *Teague*.

In *Caspari v. Bohlen*, 510 U.S. 383, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994), a state prisoner was convicted of three counts of first-degree robbery, and pursuant to Missouri law, the trial court found beyond a

reasonable doubt that the prisoner was a "persistent offender" and sentenced him to three consecutive terms of 15 years imprisonment. 114 S. Ct. at 951-52. On direct appeal, the Missouri Court of Appeals found there was insufficient evidence presented to prove the prior convictions, and ordered the matter remanded to the trial court for proof of the prior convictions. 114 S. Ct. at 952. On remand, the State introduced proof of four prior felony convictions. Notwithstanding a double jeopardy claim raised by the Petitioner, the trial court again sentenced him as a persistent offender. Id. On direct appeal from the resentencing, the state appellate court rejected the prisoner's double jeopardy claim, stating, "[t]he question of double jeopardy was not involved because those provisions of the Fifth Amendment have been held not to apply to sentencing." Id. The prisoner then sought federal habeas relief. The federal district court rejected the prisoner's double jeopardy claim, but the United States Court of Appeals for the Eighth Circuit reversed, holding that the persistent offender sentence enhancement procedure in Missouri had "protections" similar to a capital sentencing proceeding and, therefore, the double jeopardy protection afforded a capital prisoner applied to a non-capital, persistent offender as well. Id.

The United States Supreme Court granted certiorari and, after noting that the Eighth Circuit's holding appeared to be "foreclosed" by the Court's prior decisions, reversed the Eighth Circuit's decision on the gound that its holding that the Double Jeopardy Clause applied to non-capital sentencing proceedings constituted the announcement of a new rule on collateral review, contrary to the dictates of *Teague*. 114 S. Ct. at 954-56.

Like the Eighth Circuit's decision in *Caspari*, this Court's holding in the instant case appears to be contrary to United States Supreme Court precedent. More importantly, however, this Court's holding announces a new rule on collateral review. Accordingly, this Court should grant a rehearing to determine whether its decision is barred by *Teague*.

B. Applicability of Double Jeopardy Clause to a Non-Capital Sentence

As argued above, this Court's decision is contrary to the United States Supreme Court's holding in *DiFrancesco*. Moreover, assuming arguendo that the Double Jeopardy Clause is implicated in a resentencing of a non-capital prisoner, it has no application in the instance case because Petitioner did not receive a harsher sentence when he was resentenced.

The cases relied on by this Court in support of its holding that double jeopardy applies to resentencing proceedings clearly limit the application of the Double Jeopardy Clause to additions or increases in criminal sentences. *United States v. Moreno-Hernandez*, 48 F.3d 1112, 1116 (9th Cir. 1995) (double jeopardy clause prevents subsequent increase in punishment); *Stone v. Godbehere*, 894 F.2d 1131, 1135 (9th Cir. 1990) (double jeopardy prohibits additions to criminal sentences).

In the present case, Petitioner's sentences were not increased when he was resentenced. The trial court merely imposed the same sentences in opposite cases. Thus, there was no net increase in the punishment and double jeopardy was not implicated.

C. State Law Issue.

To reach its holding, this Court decided an issue of state law contrary to the state court's findings.

The Arizona Court of Appeals found that the trial court consolidated the plea proceedings for a joint disposition. That finding is presumed correct on collateral review. *Sumner v. Mata*, 449 U.S. 539, 546–47, 101 S. Ct. 764, 768–69, 66 L. Ed. 2d 722 (1981) (presumption of correctness applies to findings of state appellate courts as well as to findings of state trial courts).

Despite evidence presented at the evidentiary hearing in federal district court that there was a joint disposition of the plea agreements and that the parties and the trial judge intended the cases to be consolidated for purposes of sentencing (Exhibit MM to Respondents Answering Brief), and an order from the trial court consolidating the two cases (Exhibit KK to Respondents Answering Brief), this Court found otherwise.

The issue of consolidation is dispositive because Petitioner had no legitimate expectation of finality in a sentence that was placed in issue on direct appeal, and that he knew was erroneous. *Moreno-Hernandez*, 48 F.3d at 1116; *United States v. Contreras-Subias*, 13 F.3d 1341, 1346 (9th Cir. 1994). Thus, Petitioner's direct appeal in the "97" case subjected both matters to appellate review. *See United States v. Shue*, 825 F.2d 1111, 1114–15 (7th Cir. 1987) (where sentencing package was unbundled after successful appeal, double jeopardy does not bar resentencing on

affirmed counts as long as new sentence does not exceed statutory limit, and it effectuates sentencer's original intent).

Under the circumstances of this case, Petitioner did not have a legitimate expectation of finality in his original sentences. "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *Jones v. Thomas*, 491 U.S. 376, 387, 109 S. Ct. 2522, 2528, 105 L. Ed. 2d 322 (1989).

CONCLUSION

For all of the foregoing reasons, Respondents respectfully ask this Court to reconsider its decision and further suggests that a rehearing en banc is approperiate.

Respectfully submitted,

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CRM90-0683
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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
SEP 29 1997
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

KENNETH JOHN FALCONE,	
Plaintiff-Appellant,	C.A. No. 96-15755
vs.	D.C. No. CV-91-01041-RGS
TERRY STEWART, Director; ATTORNEY GENERAL OF THE STATE OF ARIZONA,	ORDER
Respondents-Appellees.	

Before: FARRIS and TASHIMA, Circuit Judges, and STAGG, senior District Judge.*

The panel has voted to deny appellees' petition for rehearing. Judge Tashima has voted to reject the suggestion for rehearing en banc, and Judges Farris and Stagg so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. p 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

* The Honorable Tom Stagg, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

Division One
Court of Appeals
State of Arizona
Filed Nov 18 1991

GLEN D. CLARK,
CLERK
By _____

KENNETH JOHN FALCONE Petitioner, v. SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, THE HONORABLE NORMAN D. HALL, a judge thereof, Respondent Judge, STATE OF ARIZONA, Real Party in Interest. STATE OF ARIZONA, Appellee, v. KENNETH JOHN FALCONE, Appellant.	1 CA-SA 91-209 1 CA-CR 90-372 (Consolidated) DEPARTMENT C MEMORANDUM DECISION (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court of Maricopa County

Cause Nos. CV 91-15855 and CR 89-08697

The Honorable Norman D. Hall, Judge

REVIEW ACCEPTED; RELIEF GRANTED;
REMANDED FOR RESENTENCING; APPEAL DISMISSED

Kenneth John Falcone
In propria persona — Tucson
and
Dean W. Trebesch, Maricopa County Public Defender
by Spencer D. Heffel, Deputy Public Defender
Attorneys for Appellant — Phoenix

Grant Woods, Attorney General
by: David Rich
Diane M. Ramsey
Assistant Attorneys General
Attorneys for Real Party in Interest — Phoenix

G R A N T, Presiding Judge

Petitioner Kenneth John Falcone brought this special action challenging the trial court's dismissal of his petition for writ of habeas corpus. In his petition, Falcone challenged the legality of his sentences imposed for convictions for attempted child molestation. The trial court held that habeas corpus relief was not available to Falcone.

Our appellate courts have consistently held that pro se petitions for habeas corpus relief should be construed liberally and read with a measure of tolerance. Stevenson v. Arizona Bd. of Pardons and

Paroles, 109 Ariz. 412, 510 P.2d 384 (1973); Dickey v. Raines, 124 Ariz. 135, 602 P.2d 516 (App. 1979). We may grant appropriate relief "even though the writ applied for or the motion made is not aptly titled." Brown v. State, 117 Ariz. 476, 477, 573 P.2d 876, 877 (1978). In short, we look to substance, not form. Id. at 477-478, 573 P.2d at 877-878; State v. Davis, 148 Ariz. 62, 65, 712 P.2d 975, 978 (App. 1985).

In general, habeas corpus relief is only available when the petitioner alleges facts showing that he is entitled to immediate release from custody. Brown, 117 Ariz. at 476, 573 P.2d at 876. From the limited record we have before us, we cannot determine whether Falcone is entitled to immediate release from prison. However, under the circumstances of this case, we treat this petition as an appeal from a denial of special action relief in the trial court. See Davis, 148 Ariz. at 65, 712 P.2d at 978. We accept jurisdiction and grant relief and remand the case for resentencing.

FACTS

Falcone was charged with several counts of child molestation pursuant to two separate indictments. He eventually entered into two separate plea agreements. In cause number CR 89-08697, Falcone agreed to plead guilty to one count of attempted child molestation, a class 3 felony and dangerous crime against children in the second degree. The parties stipulated that Falcone would be sentenced to lifetime probation in this case. In cause number CR 89-02205, Falcone agreed to plead guilty to two counts of attempted child molestation, class 3 felonies and dangerous crimes against children in the second degree. The parties did not stipulate to a sentence in this latter plea agreement.

The trial judge sentenced Falcone to ten years in prison to be followed by intensive lifetime probation on cause number CR 89-08697. Falcone was sentenced to lifetime probation on cause number CR 89-02205.

DISCUSSION

Falcone argues that the sentences imposed are contrary to Arizona law. We have reviewed the entire record before us, and have been unable to determine the precise circumstances surrounding the trial court's sentences on the two cause numbers. Unfortunately, several alternative interpretations of the trial court's sentencing order are possible, and we cannot discern the exact intent of the trial court. We therefore remand this case for resentencing. In an effort to aid the trial court and the parties on remand, we offer the following discussion setting forth the reasons why the sentences were improper under the facts of this case.

A. The plea agreements

Our review of the record reveals that the trial judge may have confused the cause numbers and the two plea agreements before him at the time of sentencing. In cause number CR 89-08697, Falcone agreed to plead guilty in exchange for a stipulate sentence of lifetime probation. The trial judge deviated from the plea agreement, either knowingly or unwittingly. Our review of the record suggests that the trial judge did intend to impose a prison sentence.[1] If this assessment of the record is correct, a prison sentence should have been imposed in cause number CR 89-02205, in which the plea agreement did not have a stipulated sentence. If the judge intended to deviate from the stipulated plea agreement in CR 89-08697, he should have stated this intention on the record and allowed Falcone a chance to withdraw his guilty pleas entered pursuant to the

---

1. At the sentencing hearing, the judge made the following statement on the record:

> Obviously, Mr. Falcone needs help, but that's not the only reason he is here this morning. Society has a right to expect the courts to punish those who violate its laws, and I intend to do that.

agreements. Rule 17.4(e), Arizona Rules of Criminal Procedure;[2] State v. De Nistor, 143 Ariz. 407, 411, 694 P.2d 237, 241 (1985).

B. Ten year sentence with lifetime probation or parole

During the sentencing hearing, the following exchange took place between Falcone's attorneys and the trial judge:

> Mr. Billar: Your honor, maybe I missed it. I think on my cause number [89-08697] you placed him on -- sentenced him to 10 years in the Department of Corrections, [and] after that you placed him on probation on my cause number?
>
> The court: That's correct.
>
> Mr. Hooper: I think it would have to be lifetime parole.
>
> The court: Well, either one. If you think it should be lifetime parole, I will state he is being given lifetime probation in the other cause starting at this time and simply to continue on. Whether he is placed on probation at this time and given the conditions of probation and is given time in the Department of Corrections, or you deem it parole, I don't know whether it makes much difference. I think probation at this time, have the probation start running, and as a condition of that probation, have to sentence him to the Department of Corrections. As you know, Mr. Billar, we frequently do that when we sentence people to jail . . . .

---

2. Rule 17.4(e) states: "If an agreement or any provision thereof is rejected by the court, it shall give the defendant an opportunity to withdraw his plea, advising him that if he permits his plea to stand, the disposition of the case may be less favorable to him than that contemplated by the agreement."

Again, the specific intent of the trial judge is difficult to determine. First, we note that a ten year prison sentence may not be a "condition of probation" as the judge seemed to indicate. See A.R.S. § 13-901(F) (court may impose one year jail term as condition of probation). Second, we cannot determine from the above exchange, or from the minute entries which followed the hearing, whether the judge intended to impose lifetime probation or lifetime parole. Either result is improper.

Our Supreme Court has declared unconstitutional the provisions of A.R.S. § 13-604.01(I) that require the sentencing judge to impose lifetime parole for persons convicted of dangerous crimes against children. State v. Wagstaff, 164 Ariz. 485, 794 P.2d 118 (1990). Therefore, imposition of lifetime parole in addition to the ten year sentence in this case is improper.

Division two of this court recently addressed the propriety of sentencing a defendant to lifetime probation in addition to a prison sentence pursuant to A.R.S. § 13-604.01.[3] In State v. Everhart, 86 Ariz. Adv. Rep. 64 (Ct. App. May 14, 1991), the court held that "a trial court may order that a convicted defendant be placed on probation if authorized in lieu of imposing a prison term; probation may not be ordered on the same offense in addition to a term of imprisonment." Id. at 65. Thus Falcone may be sentenced to the ten year prison term or lifetime probation, but not both.

CONCLUSION

Falcone is correct in his assertion that the sentences imposed by the trial court were unlawful. Because we cannot definitively determine the intent of the trial judge at the time of sentencing, we remand this case to the trial court for resentencing in both cause

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3. We note that the Arizona Supreme Court recently upheld the probation provisions of § 13-604.01. State v. Lyons, 167 Ariz. 15, 804 P.2d 744 (1990). This issue was expressly left open in Wagstaff, which dealt only with the parole provisions of the statute. Id. See Wagstaff, 164 Ariz. at 493 n.6, 794 P.2d at 126 n.6.

numbers (CR 89-08697 and CR 89-02205)[4] in accordance with this decision.

We note that Falcone currently has a direct appeal pending in this court, raising arguments identical to those raised in this action. Because we decide the merits of Falcone's arguments in this action we dismiss the appeal (1 CA-CR 90-372).

/s/_____
SARAH D. GRANT, Presiding Judge

CONCURRING:

/s/_____
THOMAS C. KLEINSCHMIDT, Judge

/s/_____
EINO M. JACOBSON, Judge

4. Our review of the record shows that the sentencing order contains both cause numbers. We therefore conclude that these causes were consolidated by the trial judge for purposes of sentencing. Rule 13.3(c), Arizona Rules of Criminal Procedure. For purposes of resentencing they should continue to be considered together.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUN 30 1994
CATHY A. CATTERSON,
CLERK, U.S. COURT OF APPEALS

KENNETH JOHN FALCONE,	) No. 93-17178
	)
Petitioner-Appellant,	) D.C. No. CV-91-01041-WPC
	)
v.	)
	)
SAMUEL A. LEWIS, et al.,	) MEMORANDUM*
	)
Respondents-Appellees.	)
	)

Appeal from the United States District Court
for the District of Arizona
William P. Copple, Senior Judge, Presiding

Submitted June 21, 1994 **

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Before: TANG, PREGERSON, and T. G. NELSON, Circuit Judges.

Kenneth John Falcone, an Arizona state prisoner, appeals pro se the district court's dismissal of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Falcone was convicted of three counts of attempted child molestation. We have jurisdiction pursuant to 28 U.S.C. § 2253, and review de novo. Thomas v. Lewis, 945 F.2d 1119, 1122 (9th Cir. 1991). We affirm in part and remand.

Background

Falcone pleaded guilty to three counts of attempted child molestation in two separate proceedings. In CR-89-08697, Falcone pleaded guilty to one count, and both sides stipulated to a sentence of lifetime probation. Falcone was sentenced to ten years imprisonment followed by lifetime probation in this proceeding. In CR-89-02205, Falcone pleaded guilty to two counts, and there was no sentence stipulation. Falcone was sentenced to lifetime probation in this proceeding.

Falcone appealed his conviction in 89-08697, contending that his sentence was improper. While this appeal was pending, Falcone filed a federal habeas petition, which was dismissed for failure to exhaust state remedies, and a state habeas petition and petition for special action, which were dismissed because his direct appeal had not yet been decided. These three actions also challenged his sentence in 89-08697. Falcone then filed another state habeas petition challenging his sentence, in which he alleged that direct appeal was not an adequate remedy because of the Arizona Court of Appeals' delay in reaching a decision. Falcone appealed the denial of this petition to the Court of Appeals in a special action, which was consolidated with his pending direct appeal.

Falcone then filed the instant habeas petition, alleging that his due process rights were violated by the improper sentencing in 89-08697 and by the Arizona Court of Appeals' delay in processing his direct appeal. While this habeas petition was pending, the Court of Appeals issued its decision vacating Falcone's ten year prison

sentence in 89-08697 and remanding both cases to the trial court for resentencing. Falcone filed a motion for reconsideration to the Court of Appeals and two petitions for review to the Arizona Supreme Court, arguing that the Court of Appeals lacked jurisdiction to remand 89-02205 for resentencing, as that case had not been appealed by either party. These petitions were denied.

While the instant habeas petition was pending, Falcone was resentenced to ten years imprisonment in 89-02205. He attempted to supplement his petition to add claims that this sentence violated his due process rights and subjected him to double jeopardy. The magistrate judge issued a report and recommendation on September 23, 1993, dismissing Falcone's claim about his original ten year sentence as moot, and finding that the Arizona Court of Appeals' delay did not violate Falcone's due process rights. The magistrate judge declined to allow Falcone to amend his petition to add his resentencing claims, reasoning that because the resentencing claims appeared to be unexhausted, such an amendment would render the petition subject to dismissal.

On that same day, Falcone filed supplemental pleadings in the district court, including documents showing that he had appealed his resentencing to the Arizona Supreme Court. Falcone again argued that he had in fact exhausted these claims in his objections to the magistrate judge's report and recommendation. The district court adopted the magistrate judge's report and dismissed the petition.

Claims from Original Habeas Petition

In his original habeas petition, Falcone alleged that his due process rights were violated by the ten year sentence he received in 89-08697, and that his due process rights were violated by the Arizona Court of Appeals' delay in processing his direct appeal. These claims are moot.

A claim is moot if "we are without power to grant the relief requested." Picrin-Peron v. Rison, 930 F.2d 773, 775 (9th Cir. 1991); see United States v. Geophysical Corp. of Alaska, 732 F.2d

693, 698 (9th Cir. 1984) (claim is moot if no effective relief can be granted). Here, Falcone's original ten year sentence has been vacated. Accordingly, he can no longer be granted effective relief on that claim. See Picrin-Peron, 930 F.2d at 775. Furthermore, because the proper relief for appellate delay is to order the appellate court to hear the appeal within a certain time or release the petitioner, see Coe v. Thurman, 922 F.2d 528, 532 (9th Cir. 1990), no further relief can be granted on Falcone's due process claim now that the Court of Appeals has issued its decision.

Resentencing Claims

Falcone attempted to supplement his original habeas petition with claims regarding his resentencing in 89-02205. Falcone alleged specifically that this new sentence violated his due process rights and subjected him to double jeopardy. We remand these claims to the district court for consideration on the merits.

The district court did not allow Falcone to add these claims to his habeas petition because they had not been (and indeed, could not have been) exhausted when the petition was filed. However, we may consider a claim on the merits if state remedies had been exhausted by the time we decide on appeal, "even if these remedies were not exhausted when the habeas corpus petition was filed." Schwartzmiller v. Gardner, 752 F.2d 1341, 1344 (9th Cir. 1984).

The exhaustion requirement is satisfied if the petitioner has given the state's highest court an opportunity to rule on the merits of his claims. Hughes v. Idaho State Bd. of Corrections, 800 F.2d 905, 906 (9th Cir. 1986); McQuown v. McCartney, 795 F.2d 807, 809 (9th Cir. 1986). Submitting a claim to the state's highest court in a procedural context in which its merits will not be considered absent special circumstances does not constitute fair presentation. Castille v. Peoples, 489 U.S. 346, 351 (1988). Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment are presumed to rest upon the same ground. Ylst v. Nunnemaker, 111 S. Ct. 2590, 2594 (1991).

Here, Falcone submitted exhibits to the district court indicating that he appealed his resentencing claims to the Arizona Supreme Court. However, appointed counsel failed to raise the due process and double jeopardy issues in his initial brief to the Arizona Court of Appeals. Counsel attempted to file amended opening briefs addressing these issues, but these briefs were refused. Falcone filed two petitions for review in the Arizona Supreme Court; these petitions raised the due process and double jeopardy issues, alleged that the Court of Appeals erred by failing to accept the amended briefs, and alleged that counsel rendered ineffective assistance by failing to include the claims in his initial brief. Both of these petitions for review were denied without comment.

Because the Arizona Supreme Court denied Falcone's petitions for review without comment, we must look through to the last reasoned opinion to determine whether these claims were fairly presented to the Arizona courts. See Ylst, 111 S. Ct. at 2594–95. The Court of Appeals refused to consider Falcone's due process and double jeopardy claims because there were not argued in the initial opening brief. Thus, we must presume that the Arizona Supreme Court also declined to review these claims based on this procedural error. See id. Accordingly, Falcone has not fairly presented these claims to the Arizona Supreme Court. See Castille, 489 U.S. at 351.

However, the Arizona Court of Appeals indicated that it had reviewed the record for fundamental error pursuant to Ariz. Rev. Stat. § 13–4035, and found none. Fundamental error is error involving the loss of a federal constitutional right. State v. Gendron, 812 P.2d 626, 628 (Ariz. 1991), including the prohibition against double jeopardy, State v. Millanes, 1994 WL 103042 *4 (Ariz. App. March 31, 1994) (No. 1 CA-CR 92-0949). When a state court is required to review the record for federal constitutional error, even if the petitioner fails to properly raise that issue in state court, the state court's determination that there was no such error constitutes a decision on the merits of the petitioner's claim. See Ake v. Oklahoma, 470 U.S. 68, 74–75 (1985); Beam v. Paskett, 3 F.3d 1301, 1306-07 (9th Cir. 1993), cert denied,114 S.Ct. 1631 (1994).

Accordingly, the Arizona Court of Appeals' review for federal constitutional error constitutes consideration of Falcone's due process and double jeopardy claims. Because the Arizona Supreme Court upheld the Court of Appeals' decision without comment, we must presume that the Supreme Court also considered these claims on the merits. See Ylst, 111 S. Ct. at 2594. Accordingly, these claims are exhausted. Because the record is not adequate for us to decide Falcone's resentencing issues, we remand to the district court for consideration of these claims on the mentis.

AFFIRMED IN PART AND REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 93-17178

KENNETH JOHN FALCONE,	)	ON APPEAL FROM THE
	)	UNITED STATES
Petitioner-Appellant,	)	DISTRICT COURT FOR THE
	)	DISTRICT OF ARIZONA,
	)	
	)	No. CIV-91-01041-WPC
-vs-	)	
	)	
	)	
SAMUEL A. LEWIS, et al.,	)	
	)	
Respondents-Appellees.	)	
	)	

RESPONDENTS-APPELLEES' PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 93-17178

KENNETH JOHN FALCONE, Petitioner-Appellant, -vs- SAMUEL A. LEWIS, et al., Respondents-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CIV-91-01041-WPC PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

Respondents-Appellees, pursuant to Rules 35 and 40, Federal Rules of Appellate Procedure, ask this Court to rehear its decision filed June 30, 1994, and suggest that a rehearing en banc would be appropriate. Reasons in support of this request are set forth in the following Memorandum of Points and Authorities.

DATED this ____ day of July, 1994.

Respectfully submitted,

GRANT WOODS
Attorney General

/S/
DIANE M. RAMSEY
Assistant Attorney General

Attorneys for RESPONDENTS-APPELLEES

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

A rehearing in this 28 U.S.C. § 2254 case is appropriate because the decision holds that, although Petitioner has not fairly presented his claims to the Arizona Supreme Court, the district court must review the merits of the claims because they are "exhausted" by virtue of a one-line statement in the lower state court decision alluding to a statutory duty to review for unspecified fundamental error.[1] The decision further holds that a subsequent one-line denial of discretionary review by the state's highest court signifies a review of the entire case for federal constitutional error regardless of the fact that no such issue was raised or briefed below. The holding is inconsistent with other federal law on procedural default and with this Court's own previous cases finding procedural default. It is so inconsistent that it does away with the exhaustion requirement of 28 U.S.C. § 2254.

II. ARGUMENT

To properly exhaust state remedies, a state prisoner has previously been required to have afforded the state's highest court the opportunity to rule upon the merits of his federal constitutional claim by "fairly presenting" the claim to the state's highest court in a procedurally appropriate manner. *See, e.g., Castille v. Peoples*, 489 U.S. 346, 352, 109 S. Ct. 1056, 103 L. Ed. 2d 380 (1989); *Bland v. California Dept. of Corrections*, 20 F.3d 1469, 1472–73 (9th Cir. 1994); *Jennison v. Goldsmith*, 940 F.2d 1308, 1310–12 (9th Cir. 1991); *Kim v. Villalobos*, 799 F.2d 1317, 1319 (9th Cir. 1986). Petitioner in this case did not "present" his claims in any state court, let alone "fairly present" them to the state's highest court. He did not raise them in the trial court at the resentencing.

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1. This is *not* a case like *Walker v. Endell*, 828 F.2d 1378, 1382 (9th Cir. 1987), where the state appellate court used statutory authority to reach and analyze a procedurally suspect claim.

When he offered them as an after-thought in an amended opening brief, the state appellate court *refused to accept the brief* in accordance with established state procedure. *See* Rule 31.13c(1)(iv), Ariz. R. Crim. Pro.; *State v. Doolittle*, 155 Ariz. 352, 357, 746 P.2d 924, 929 (Ct. App. 1987) (an appellant is not entitled to raise new issues for the first time in a reply brief). Thus no state court ever looked at the merits of his claims. It defies logic to hold that such claims were not fairly presented (Memorandum Decision at 6), yet they are exhausted. As the foregoing federal cases indicate, exhaustion requires "fair presentation." The plain meaning of the term "presentation" requires that the prisoner "present" or "raise" the claim in some manner. The holding in this case simply negates the requirement of "fair presentation" and makes exhaustion automatic.

The Court's previous cases recognized the requirement of fair presentation of federal claims in state court as a prerequisite to federal review. This Court has heretofore upheld district court findings of procedural default without reference to the state appellate court's duty to review for fundamental error. *See, e.g., Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1600 (1993)[2]; *White v. Lewis*, 874 F.2d 599, 602-03 (9th Cir. 1989); *Tacho v. Martinez*, 862 F.2d 1376, 1381 (9th Cir. 1988); *Dickey v. Lewis*, 859 F.2d 1365, 1368 (9th Cir. 1988)[3].

The change in the Court's approach to procedural default reflected in this case flies in the face of the doctrine of comity between the state and federal courts. The ruling in the present case effectively eliminates Rule 31 of the Arizona Rules of Procedure

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2. If the *en banc* court had accepted the kind of reasoning advanced by this case, it should have examined on the merits all of Carriger's claims involving ineffective assistance of counsel because he did on direct appeal raise one of those claims. Nevertheless, the *en banc* court respected the procedural bar found by the Arizona Supreme Court (in the alternative) on every claim except the one Carriger fairly presented on direct appeal. 971 F. 2d at 333.

3. The Arizona Supreme Court specifically said in *State v. Dickey*, 125 Ariz. 163, 170, 608 P.2d 302, 309 (1980), that it had done the statutory review for fundamental error on appeal. Nonetheless this Court found procedural default.

regarding the filing of appellate briefs in Arizona. Arizona appellate courts review every criminal case for fundamental error. A.R.S. § 13-4035; *State v. Herrera*, 176 Ariz. 21, 35, 859 P.2d 131, 145, *cert. denied*, 114 S. Ct. 398 (1993). Accordingly, under the rationale suggested by this case, a state prisoner will *never* be found to have procedurally defaulted on *any* issue not raised in the state appellate courts. No appellate can operate effectively under a rule that says it will review every issue in the case whether or not the appellant presents it in the opening brief.[4] Yet this Court is not giving effect to the state's rule. Comity is not well served by a federal approach that reaches the merits of every claim.[5] *See Murray v. Carrier*, 477 U.S. 478, 487, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986); *Engle v. Isaac*, 456 U.S. 107, 129, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982) (affirming the importance of a state contemporaneous objection rule that the federal courts must respect.)

The ruling in the present case is inconsistent with *Engle*. The petitioner in *Engle* brought a habeas corpus action challenging the constitutionality of a jury instruction given during his trial in an Ohio state court. 456 U.S. at 1229. Isaac did not object to the instruction at trial, and the Ohio Court of Appeals refused to entertain his challenge to that instruction. The Ohio court cited Isaac's failure to comply with Ohio's contemporaneous objection rule, and dismissed his claim for lack of a substantial constitutional

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4. Federal law recognizes this fact. *See* Rule 28(a), F.R.A.P.; *Hobbs v. Blackburn*, 752 F.2d 1079, 1083 (5th Cir.), *cert. denied*, 474 U.S. 838 (1985) (petitioner waived claims not raised in his opening brief); *Williams v. Leach*, 938 F.2d 769, 774 (7th Cir. 1991) (claims not raised in opening brief abandoned); *Mississippi River Corp. v. F.T.C.*, 454 F.2d 1083, 1093 (8th Cir. 1972) (new issues cannot be raised in reply brief).

5. The decision remands the case to the district court to develop the record on these new claims. By definition unexhausted claims have not been litigated in state court. Without a state court record the district court in many cases will need to hold an evidentiary hearing to develop necessary facts. That is not the role of the federal courts under 28 U.S.C. § 2254. *See Keeney v. Tamayo-Reyes*, ___ U.S. ___, 112 S. Ct. 1715, 1719-21, 118 L. Ed. 2d 318 (1992) (a state prisoner seeking federal habeas review cannot raise new matters in federal court unless he can meet the cause and prejudice test for his failure to raise the identical claims and develop the facts to support those claims in state court).

question. 456 U.S. at 125 n.27. Isaac argued in his habeas petition that, because the Ohio appellate courts engage in a "plain-error" review, and because Ohio courts may excuse procedural default as part of such a review, his claim was not barred from federal habeas review. *Id.* The Supreme Court rejected Isaac's argument. Noting that the Ohio plain-error rule applies only in "exceptional circumstances," such as where, "but for the error, the outcome of the trial clearly would have been otherwise," the Court ruled that the Ohio courts had not excused Isaac's procedural default. *Id.* Likewise by refusing to accept Petitioner's amended opening brief offered after the state had prepared its answering brief in this case, the Arizona courts did not excuse Petitioner's procedural default.

The Court's approach in this case, as well as in the cited case of *Beam v. Paskett*, 3 F.3d 1301 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1631 (1994), directly contradicts the approach taken by other circuits. In *Puleio v. Vose*, 830 F.2d 1197 (1st Cir. 1987), *cert. denied*, 4585 U.S. 990 (1988), the First Circuit rejected an argument virtually identical to that advanced by this case. In *Puleio*, the defendant failed at trial to challenge a jury instruction defining malice aforethought. Because Massachusetts law provides that an appellate court may reach the merits of an issue, notwithstanding procedural default, to determine whether a miscarriage of justice likely occurred, the Massachusetts Supreme Judicial Court engaged in a harmless error analysis. *Puleio*, 830 F.2d at 1200. Notwithstanding the Massachusetts' court's analysis, the First Circuit rejected the defendant's claim on the basis of procedural default, finding that state court "review under the discretionary state miscarriage of justice standard will not suffice, in and of itself, to bypass the Commonwealth's contemporaneous objection rule." *Id.* *See also Tart v. Commonwealth of Massachusetts*, 949 F.2d 490 (1st Cir. 1991) (mere fact that state appellate court has engaged in discretionary review under "miscarriage of justice" analysis does not indicate that the reviewing court has determined to waive independent state procedural ground for affirming conviction).

The Massachusetts miscarriage-of-justice review is very similar to the fundamental-error review engaged in by Arizona appellate courts. The "fundamental-error" review by Arizona appellate courts is not simply a review for federal constitutional error. Fundamental error only results upon a finding of "error of such dimension that it cannot be said it is possible for a defendant to have had a fair trial." *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). The Arizona Supreme Court has ruled that federal constitutional claims can be waived. *See, e.g., State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1185 (1993) (defendant's claims that voir dire was inadequate and that his rights to be present and to be represented by counsel during voir dire were violated deemed waived because he failed to object at trial); *State v. Holder*, 155 Ariz. 83, 85, 745 P.2d 141, 143 (1987) (*Batson* claim waived by failure to object during voir dire). Thus, Arizona's "fundamental-error" review is necessarily a review for something more than simply federal constitutional error. As with the "miscarriage of justice" review in Massachusetts, Arizona's fundamental-error review goes beyond a finding of constitutional error, and looks to the overall fairness of the trial. The fact that a state appellate court extends to a criminal defendant the additional benefit of a discretionary review for such error should not result in the obliteration of rules governing waiver and preclusion. The approach taken by the First Circuit Court recognizes this principle, and should be adopted by this Court.

Similarly, in *Hayes v. Lockhart*, 766 F.2d 1247 (8th Cir.), *cert. denied*, 474 U.S. 922 (1985), the Eighth Circuit Court of Appeals rejected an "implicit consideration" argument. In *Hayes*, the defendant failed to object to what he later claimed was a defective jury instruction. The Arkansas Supreme Court declined to reach the merits of the claim, but ruled—as part of a "plain error" analysis—that the instruction was not prejudicial. 766 F.2d at 1252. The defendant filed a habeas petition, which was denied by the federal district court. *Id.* The Eighth Circuit affirmed the district court's ruling, rejecting the defendant's argument that, because the Arkansas Supreme Court rejected the claim as part of a "plain error" analysis, the defendant was somehow entitled to an independent federal court

determination of the issue. *Id*; *see also Bannister v. Armontrout*, 4 F.3d 1434, 1445 n. 16 (8th Cir 1993) (*pet. for cert. filed* May 27, 1994).

Furthermore, it is incorrect to equate Arizona's doctrine of fundamental error to the specific type of review required by statute in Idaho in *Beam v. Paskett*. For several reasons, *Beam* is not persuasive authority. First, *Beam* held that the petitioner had in fact fairly presented his claim alleging a vague aggravating circumstance, the "continuing threat" factor. *Beam*, 3 F.3d at 1306. Thus, the remainder of the discussion on that point is dictum. Furthermore, Idaho has a statute specifying what sentencing factors the state supreme court *must* examine in a capital case even if the defendant does not raise those issues. This Court said in *Beam*: "Because the reviewing court has statutory notice of *the types of errors* for which it is *required* to examine the record, it is presumed that it has carried out its statutory obligations even when it does not expressly indicate it its opinion that it is has done so." 3 F.3d at 1306 (emphasis added). Under those statutory circumstances, *Beam* would not have had to demonstrate cause and prejudice even if he had not expressly challenged a specific sentencing factor on appeal. *Id*. But that is a far cry from presuming that the Arizona appellate court reviews any conceivable error where the statute does *not* set forth "certain specified types of errors" as noted in the *Beam* case. The Arizona statute does not give the appellate court *any* specified errors to look for. The statue under review here, A.R.S. § 13-4035(B), says only that: "[u]pon an appeal taken by the defendant from the judgment, the supreme court shall review the entire record." The presumption indulged in this case that this language means that the state court reviewed for any possible federal constitutional error is not a sound presumption. It is also worth noting that *Beam* deals with a statutory aggravating circumstance that directly affected imposition of the death penalty. On the other hand, Petitioner's double jeopardy complaint about a resentencing is even waivable in a federal direct appeal. *United States v. Vontsteen*, 950 F.2d 1086, 1093 (5th Cir.), *cert. denied*, 112 S. Ct. 3039 (1992). This case is on collateral review.

The Courts' reliance on *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), is also misplaced. In *Ake*, the Supreme Court excused—on direct appeal from the Oklahoma Supreme Court—the defendant's procedural default because "the State had made application of the procedural bar dependent on an antecedent ruling on federal law." 470 U.S. at 75. At trial, Ake requested a psychiatric evaluation at state expense to determine his mental state at the time of the offense. *Id.* at 72. The trial court rejected his request, and he was unable to present testimony to support his sole defense, insanity. *Id.* Ake filed a motion for new trial, but did not repeat his request for a psychiatric evaluation in that motion. After the motion was denied, Ake filed a direct appeal with the Oklahoma Court of Criminal Appeals, arguing, among other things, that he should have been provided the services of a court-appointed psychiatrist. *Id.* at 73. The Oklahoma Court of Criminal Appeals rejected his argument on the merits, then also ruled that he had waived the claim by not raising it in his motion for a new trial. *Id.* at 74.

On direct review, the Supreme Court reversed and ruled that, because under Oklahoma law, federal constitutional errors cannot be waived, the Oklahoma court had necessarily addressed the merits of the federal constitutional claim before applying a procedural bar. Thus, in *Ake*, the court ruled that Oklahoma had made the application of the procedural bar dependent on an antecedent ruling on federal law, and the issue was preserved for consideration on direct appeal. *Id.* at 74–75. In Arizona, unlike Oklahoma, federal constitutional claims can be waived. Thus, the rationale underlying the ruling in *Ake* is not applicable in this case.

Furthermore, *Ake* did not involve the enforcement of a state procedural rule. The issue in *Ake* had been presented at trial, and the trial court had been given an opportunity to consider it during trial, when the error could most easily have been cured. Finally, *Ake* was a "direct appeal" to the Supreme Court, and did not involve the same concerns present on collateral review. In *Coleman v. Thompson*, ___ U.S. ___, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), the Supreme Court noted that *Ake* was a direct review case,

and has *never* been applied in federal habeas cases. 111 S. Ct. at 2560. Because of the concerns of comity and finality present on collateral review this Court should not extend *Ake* to this case.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully ask this Court to reconsider its decision and further suggests a rehearing en banc is appropriate.

DATED this ____ day of July, 1994.

Respectfully submitted,

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/S/
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CERTIFICATE OF SERVICE

ONE COPY of this Petition was deposited for mailing this 13th day of July, 1994, to:

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
AUG 17 1994
CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

KENNETH JOHN FALCONE,	)	
	)	No. 93-17178
	)	
Petitioner-Appellant,	)	
	)	D.C. No. CV-91-01041-WPC
	)	Arizona (Phoenix)
v.	)	
SAMUEL A. LEWIS, et. al.,	)	ORDER
	)	
Respondent's-Appellees.	)	
	)	

Before: TANG, PREGERSON, and T. G. NELSON, Circuit Judges.

The panel has voted to deny appellee' petition for reharing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggrestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for reharing is denied and the suggestion for rehearing en banc is rejected.